Petition

81-1151

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No. .....

In The
Supreme Court of the United States
October Term, 1981

DANIEL C. STEWART,
Petitioner,

vs.

JONATHAN KUTNER, ET AL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the Fifth Circuit err in holding that the finality requirement of 28 U.S.C. § 1293 is applicable to a direct appeal from the bankruptcy courts to the circuit courts of appeals during the transition period of the Bankruptcy Reform Act of 1978?

B. Did the Fifth Circuit err in holding that the order of the bankruptcy judge, striking the trustee's motion to convert a Chapter 13 proceeding to a Chapter 7 proceeding, is interlocutory in character?

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OPINION BELOW

The opinion of the Court of Appeals, dated September 21, 1981 is reported at 656 F.2d 1107 and appears in Appendix A of this Petition. The opinion of the Court of Appeals upon the Petition for Rehearing, dated November 6, 1981, is reported at ..... F.2d ..... and appears in Appendix A of this Petition. The Memorandum Opinion of the United States Bankruptcy Court for the Northern District of Texas is reported at 3 B.R. 422 and also appears in Appendix A of this Petition.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on September 21, 1981. Petition for Rehearing was denied on November 6, 1981. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Bankruptcy Reform Act of 1978, Public Law 95-598 § 405(c) (1) provides in pertinent part:

> During the transition period, an appeal from a judgment, order, or decree of a United States bankruptcy judge shall be . . . if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals.

The full text of § 405(c) (1) is set out in Appendix B of this Petition. Title 11, U.S.C. § 109(e) provides in pertinent part:

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 . . . may be a debtor under Chapter 13 of this title.

The full text of § 109(e) is set out in Appendix B of this Petition.

Title 11, U.S.C., Chapter 13, § 1307 provides in pertinent part:

> . . . on request of a party in interest . . . the court may convert a case under this chapter to a case under Chapter 7 of this title . . . for cause . . .

The full text of § 1307 is set out in Appendix B of this Petition.

STATEMENT OF THE CASE

This is a bankruptcy case filed under Chapter 13 of Title 11, United States Code (hereinafter the Code). The Code became effective October 1, 1979. Originally three debtors, Jonathan Kutner, Charles Christopher, and Samuel Rosenthal filed petitions under Chapter 13 of the Code on Octo-

ber 3, 1979. The schedules attached to each of their petitions reflect that on such date they owed the following respective amounts of unsecured debts: Kutner, $3,724,624.98; Christopher, $2,543,546.60; and Rosenthal, $1,215,317.64.

Daniel C. Stewart ("Stewart" or "Trustee") was appointed by the United States Trustee for the Northern District of Texas to serve as trustee for the estates of the debtors. Upon investigating the schedules attached to the petitions of the debtors, Stewart understandably concluded that Kutner, Christopher and Rosenthal were not eligible for relief under Chapter 13 of Title 11. On October 9, 1979 the Trustee filed a Motion with the Bankruptcy Judge pursuant to 11 U.S.C. § 1307(c) to convert the cases to liquidation proceedings under Chapter 7 of the Code. The respective debtors opposed the motion of the Trustee.

On November 19, 1981, following a lengthy hearing and findings and conclusions that each of such debtors was in fact ineligible for Chapter 13 relief because each had unsecured debts in excess of the statutory limits, the Bankruptcy Judge nevertheless entered an order sustaining the motion of the debtors to strike the Trustee's conversion motion.

On November 29, 1979, the Trustee filed a notice of appeal from the Judge's order of November 19, 1979 in the three cases. Two of the cases, those of Kutner and Christopher, were subsequently converted to cases under Chapter 7 of the Code upon motion of intervening creditors, leaving only the Rosenthal case in Chapter 13. The parties agreed to a direct appeal of the case to the Fifth Circuit Court of Appeals on March 8, 1980. On September 16, 1980, the Fifth Circuit granted the motion of the United States to file an *amicus curiae* brief in the case. The following single issue was briefed and argued before the Fifth Circuit:

> Whether the chapter 13 trustee has standing as a "party in interest" to move for the conversion of the case filed

under Chapter 13 to a proceeding under Chapter 7 of the Bankruptcy Code?

The Fifth Circuit however did not reach nor decide this issue. Rather, following briefs and oral argument, the Court of Appeals *sua sponte* raised and decided that the appeal should be dismissed for want of jurisdiction. The Fifth Circuit concluded that the order of the Bankruptcy Judge striking the motion of the Trustee to convert a Chapter 13 proceeding to a Chapter 7 proceeding was interlocutory in character and direct appeal thereof to a Court of Appeals would not lie under 28 U.S.C. § 1293.

The Trustee timely filed a petition for rehearing, which petition was denied on November 6, 1981. In denying the petition for rehearing the Fifth Circuit entered an order substituting one paragraph of the original opinion.

EXISTENCE OF JURISDICTION BELOW

The Bankruptcy Court for the Northern District of Texas had jurisdiction over the Trustee's motion to convert a Chapter 13 proceeding to a Chapter 7 proceeding pursuant to 28 U.S.C. § 1471. The jurisdiction of the Fifth Circuit Court of Appeals is the subject of this Petition for a Writ of Certiorari, and exists pursuant to Public Law 95-598 § 405(c) (1).

ARGUMENT

A. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE FINALITY REQUIREMENT OF 28 U.S.C. § 1293 IS APPLICABLE TO A DIRECT APPEAL FROM THE BANKRUPTCY COURT BY AGREEMENT OF THE PARTIES DURING THE "TRANSITION PERIOD" OF THE BANKRUPTCY REFORM ACT OF 1978.

This case concerns the rights of creditors and debtors who are involved in proceedings under the Bankruptcy Reform

Act of 1978, of which the Code is a major part of the bankruptcy law revision. Cases filed under the Code number in the hundreds of thousands. In view of the recent surge in bankruptcy case filings, and the novel legal issues arising under the Code, a compelling need exists to clarify the rights of parties (both debtors and creditors) in the bankruptcy courts to obtain appellate review.

The right to appeal a judgment, order, or decree of a bankruptcy judge is currently in a state of uncertainty because of conflicting decisions rendered by the Second Circuit Court of Appeals and the Fifth Circuit Court of Appeals (decision below). The uncertainty arises out of the respective judicial interpretations of a statute governing the "transition period" between the former Bankruptcy Act and the new Code, which period commenced on October 1, 1979 and will end on March 31, 1984.

The unresolved issue is whether the judgment, order, and decree of a bankruptcy judge entered during the transition period must be "final" before an appeal will lie to the courts of appeal.

The Second Circuit in *Riddenvold v. Saratoga Hospital*, 647 F.2d 342 (2nd Cir. April 27, 1981) concluded:

> "It seems therefore that, for whatever reason, Congress did not intend the finality requirement of the new § 1293(b) to apply to appeals taken to the courts of appeals from orders of bankruptcy judges by agreement during the transition period."

The Fifth Circuit in its decision below reached the opposite conclusion:

> "We conclude that new Title 28 U.S.C. § 1293(b) governs and determines whether we have jurisdiction of the present appeal. The plain meaning of the provisions of that section is that the order, judgment, or

> decree of the bankruptcy court must be a final one before a court of appeals has jurisdiction to consider it on a direct appeal. This being true, it follows that a court of appeals does not have jurisdiction of a direct appeal of an interlocutory order, judgment, or decree of a bankruptcy court."

The Fifth Circuit further notes: "However, some confusion may exist as to jurisdiction and procedure during this [transition] period." Petitioner submits that the opinion of the Second Circuit more accurately conforms with the purposes of the transition legislation.

By having interlocutory orders, judgments, and decrees directly appealable to the circuit courts of appeals during the transition period, a body of case law authority from the appellate courts would more rapidly develop to resolve the inevitable interpretational problems that have arisen during the early years of the new bankruptcy legislation. The failure of the Fifth Circuit in its opinion below to acknowledge jurisdiction demands this Court's review.

B. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE ORDER OF THE BANKRUPTCY JUDGE, STRIKING THE MOTION OF THE TRUSTEE TO CONVERT A CHAPTER PROCEEDING TO ANOTHER CHAPTER, IS INTERLOCUTORY IN CHARACTER.

In bankruptcy matters, which by their nature involve many parties' rights and which, particularly in business reorganization case tend to last for years, the question of what is a final and what is an interlocutory order for purposes of appeal is of great importance.

An order striking a motion to convert a Chapter 13 proceeding to a Chapter 7 proceeding is a final order in that it absolutely denies the substantive remedy that was contemplated by the Movant. An order denying a motion to

convert is a final adjudication of the particular form of Bankruptcy Code relief available to the debtor and the creditors. The form of bankruptcy relief, whether it be Chapter 7, 9, 11, or 13, establishes the bundle of rights and duties in existence between the debtor and his creditors during the pendency of the bankruptcy case. For example, in a Chapter 13 case, the debtor will remain in possession of all his property unless his plan provides otherwise, 11 U.S.C. § 1306. On the other hand, in Chapter 7 a debtor is obligated to turn over all of his non-exempt property to the trustee, 11 U.S.C. § 521(3). Chapter 13 relief anticipates the application of the debtor's future income to retire all or a portion of the indebtedness, see, 11 U.S.C. § 109(e); 11 U.S.C. § 1306(c)(2); and 11 U.S.C. § 1322(a)(1). In return for consummating payments under a Chapter 13 plan the debtor receives an extensive discharge of debts, many not otherwise dischargeable in Chapter 7; see, 11 U.S.C. §§ 523, 727 and 1328.

It is thus clear that the remedy of conversion available under 11 U.S.C. § 1307 will substantially define the future course of interaction between the debtor and his creditors. An order of the bankruptcy court denying a creditor's or trustee's motion to convert conclusively and finally determines the direction of the debtor's form of relief and the creditors' rights under the Bankruptcy Code.

This Court has not, since the adoption of the Act, addressed the issue of whether an order denying a motion to convert a chapter proceeding is "final" within the meaning of 28 U.S.C. § 1293. However in a decision under the prior Bankruptcy Act, the Court implied that such conversion orders are final. In *Securities and Exchange Commission v. American Trailer Rental Company*, 379 U.S. 594 (1965), the S.E.C. filed a motion, under Section 328 of the old Bankruptcy Act, to dismiss a Chapter XI proceeding or,

in effect, transfer it to Chapter X on the grounds that it should have been brought under Chapter X of the Bankruptcy Act in the first instance. The bankruptcy referee denied the motion; the district court and the court of appeals affirmed the referee. This Court granted certiorari, 376 U.S. 948, then reversed and remanded the case in order that it be converted to Chaper X. The opinion is silent on whether this Court had jurisdiction to review the order, which Petitioner contends is indicative that the Court believed the referee's order was final and thus within its jurisdiction. This Court had held in a previous case that the appeal of an interlocutory order in a bankruptcy proceeding is not a proper case for appeal to the Supreme Court, *Mitchell Store Building Company v. Carroll*, 232 U.S. 379 (1914).

Plainly, the *American Trailer Rental* decision is clear authority that a bankruptcy court order denying a motion to convert from one form of relief (Chapter) to another form of relief (Chapter) is a final order which is subject to review by the Court of Appeals. This is clearly proper since the selection of the particular form of relief (Chapter) defines the framework and guidelines under which the rights of the parties will be pursued. Although the *American Trailer Rental* decision was argued in our Petition for Rehearing before the Fifth Circuit, the court below apparently decided not to follow its teaching. Rather, upon the Petition for Rehearing, the Fifth Circuit substitued the following paragraph into its September 21, 1981 opinion:

> The order in the instant appeal merely disposes of an incidental procedural matter during the proceeding in the bankruptcy court, but is not final. Compare 28 U.S.C. §1291 and the cases interpreting that statute."

Petitioner asserts that the selection of the appropriate form of relief (Chapter) is far more than an incidental pro-

cedural matter in the course of a bankruptcy case. Furthermore cases interpreting the final judgment statute do not support the conclusion of the court below, but reflect that even some interlocutory orders may be appealed if they come within the collateral order exception. This Court stated the effect of 28 U.S.C. § 1291 in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 451, 546 (1949) is to disallow appeal from any decision which is tentative, informal or incomplete. The Court concluded that an order is appealable if it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. The federal district court order appealed in *Cohen* was one fixing the security to be given by stockholders in a derivative action suit in an amount less than that required by a New Jersey statute. Likewise in *Swift & Co. Packers v. Companion Colombian Del Caribe*, 339 U.S. 684, the court reaffirmed the existence of a small class of orders which finally determine claims of rights separable from and collateral to, rights asserted in the action, and which are therefore appealable under 28 U.S.C. § 1291. These decisions reflect that the Court has given the "finality" requirement of 28 U.S.C. § 1291 a practical rather than a technical construction. The Fifth Circuit in the decision below failed to apply the pragmatic construction this Court has given to 28 U.S.C. § 1291 in concluding that the order of the bankruptcy judge was not final within the meaning of 28 U.S.C. § 1293.

The issue under appeal to the Fifth Circuit was whether a Chapter 13 trustee is a "party in interest" as the term is used in 11 U.S.C. § 1307 with standing to act on behalf of creditors. The bankruptcy judge below decided the trustee was not a "party in interest" and entered an order striking the trustee's motion to convert the cases. Such order is a final determination of the trustee's claim of right separable

from and collateral to the merits of the debtor's claim to a right of relief under Chapter 13 of the Bankruptcy Code. If the trustee's or any creditors' claim to the rights and status of a "party in interest" is not appealable until the debtor's petition for relief under Chapter 13 is consummated upon discharge, it will be too late effectively to review the order below as payments under the Chapter 13 plan will be accomplished; and the rights conferred by 11 U.S.C. § 1307, if they are applicable to the trustee, will have been lost, probably irreparably. The overbroad construction in the decision below as to what constitutes a "final" judgment, order, or decree of a bankruptcy judge effectively denies the right of litigants in the bankruptcy courts to seek appellate review until a point far removed in time from the date of the Bankruptcy Judge's decision.

CONCLUSION

The Fifth Circuit, in its opinion below, has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. The court below erred in its holding that the Bankruptcy Judge's order was interlocutory in character, as is evident from this Court's decisions in *American Trailer Rentals* and *Cohen*. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Appendix A

In the Matter of
JONATHAN KUTNER, ET AL., DEBTORS.

DANIEL C. STEWART,
Appellant,

v.

JONATHAN KUTNER, ET AL.,
Appellees.

No. 80-1416.

United States Court of Appeals,
Fifth Circuit.
Unit A

Sept. 21, 1981.

Before SKELTON*, Senior Judge, and RUBIN and REAVLEY, Circuit Judges.

SKELTON, Senior Judge.

This is a bankruptcy case. The facts are not in dispute and are generally as follows. Originally three debtors, Charles S. Christopher, Jonathan Kutner, and Samuel Marvin Rosenthal filed petitions in bankruptcy in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, on October 3, 1979, under Chapter 13 of the new Bankruptcy Code (the Code) enacted by Congress on November 6, 1978, as Public Law 95-598, 92 Stat, 2549, 11 U.S.C., effective October 1, 1979.[1] This code replaced the Bankruptcy Act (the Act) of 1898. In order to be eligible for relief under Chapter 13, the debtors had to comply with

*Senior Judge of the United States Court of Claims, sitting by designation.

[1]Some of the sections of the Code are not effective until October 1, 1984. See Section 402 of the Code for the various effective dates. The period between October 1, 1979, and the respective effective dates of the sections is designated as a transition period.

11 U.S.C. § 109(a) and (e) which provide in pertinent part as follows:

> § 109. Who may be a debtor
>
> (a) Notwithstanding any other provision of this section, only a person that resides in the United States, or has a domicile, a place of business or property in the United States, or a municipality, may be a debtor under this title.
>
> * * * * *
>
> (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title.

The part of Section 109 that is material to the instant case is the provision that the debtor "owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000." All of the above debtors owed more than $100,000 of such unsecured debts on the date they filed their petitions, but this fact was not shown on the face of the petitions. The schedules attached to their petitions showed that on such date they owed the following respective amounts of unsecured debts: Christopher, $2,543,546.60, Kutner, $3,724,624.98, and Rosenthal, $1,215,317.64.

On October 4, 1979, the United States Trustee appointed Daniel C. Stewart as a standing trustee (the trustee) in these cases in accordance with 11 U.S.C. § 1501, 28 U.S.C. § 586(b) and 11 U.S.C. § 151302. Upon investigating the schedules attached to the petitions of the debtors, as well as their financial affairs, the trustee discovered that each of the debtors had listed most of their unsecured debts as contin-

gent when they were actually noncontingent and liquidated. As a result, each of the debtors owed more than $100,000 in unsecured debts. On October 9, 1979, the trustee filed a request with the bankruptcy judge (the judge) under 11 U.S.C. § 1307(c) to convert the cases to proceedings under Chapter 7 of Title 11 for the reason that each of the debtors was ineligible to file a petition under Chapter 13. The respective debtors moved to strike the application of the trustee upon the ground that he was not a party in interest under Chapter 13, Section 1307(c) of the Code, and consequently had no standing to file the conversion application. Section 1307(c) provides as follows:

§ 1307. Conversion or dismissal

* * * * *

(c) Except as provided in subsection (e) of this section, *on request of a party in interest* and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including —

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1321 of this title;

(4) denial of confirmation of a plan under section 1325 of this title and denial of additional time for filing another plan or a modification of a plan;

(5) material default by the debtor with respect to a term of a confirmed plan;

(6) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title; and

(7) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan.

(Emphasis supplied).

After notice, a joint hearing was held by the judge and at the conclusion thereof the judge found that the standing trustee was not a party in interest under Chapter 13 of Title 11 of the Code. He entered an order on November 19, 1979, sustaining the motions of the debtors and striking the conversion application of the trustee. He filed a written opinion on March 18, 1980, in support of his order of November 19, 1979.

After the judge entered his order of November 19, 1979, striking the conversion application of the trustee, the creditors of debtors Christopher and Kutner joined in a motion of the trustee to convert their cases to cases under Chapter 11 of the Code. The motion was granted by the judge and the cases were accordingly converted in accordance with Section 1307(d) which provides:

(d) Except as provided in subsection (e) of this section, at any time before the confirmation of a plan under section 1325 of this title, on request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title.

Consequently, the standing of the trustee as a party in interest is no longer at issue in those two cases. Therefore, we are only concerned with this issue in the Rosenthal case.

On November 29, 1979, the trustee filed a notice of appeal from the judge's order of November 19, 1979, in the Rosenthal case. Pursuant to Title 28, U.S.C. § 1293, the parties stipulated to a direct appeal of the case to this court. On September 16, 1980, we granted a motion of the United States to file an amicus curiae brief in the case, and on March 17, 1981, we granted the motion of the United States for leave to participate in the oral argument. The trustee and the government filed briefs and argued the case, but the debtor did not file a brief nor participate in the argument.

The parties have presented the following single issue in this appeal which they ask us to decide:

> Whether the standing chapter 13 trustee has standing as a party in interest to move for the conversion of the case filed under Chapter 13 to a proceeding under Chapter 7 of the Bankruptcy Code.

However, we do not reach nor decide this issue because of want of jurisdiction for reasons stated below.

At the outset we are confronted with the threshold question of whether or not we have jurisdiction of the appeal in this case. Neither party has raised this question. Nevertheless, it is the duty of the court to determine on its own motion whether it has jurisdiction of any case before it. *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100 (5 Cir. 1981), and Fed.R.Civ.P. 12(h) (3). It is immaterial that the parties have not raised the question nor that they have agreed to the appeal, as they cannot confer jurisdiction by agreement or waiver if it does not otherwise exist. *American Fire and Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).

Material to our jurisdiction is whether the order of the court involved in this appeal is a final order or an interlocutory order. Whether a particular order is interlocutory or final is not always easy to determine. The Supreme Court has said that a final decision must generally be "one which ends the litigation * * * and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911, 916 (1945). The Sixth Circuit Court of Appeals defines a final judgment thus in *City of Louisa v. Leiu*, 140 F.2d 512, 514 (6 Cir. 1944):

> A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness, for giving effect to the judgment and leaves nothing to be done in the cause save superintend, ministerially, the execution of the decree.

On the other hand an interlocutory order is one that does not finally dispose of the entire case, but merely decides some incidental matter connected with the litigation. *See* 1 *Collier on Bankruptcy*, ¶ 3.03 (15th ed. 1980) at 3-301 where it is stated:

> An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.

The order in the instant appeal merely disposes of an incidental procedural matter during the proceedings in the bankruptcy court, but it is not an order or judgment that ends the bankruptcy proceedings. We conclude, therefore, that the order is interlocutory in character. Under these circumstances, we must determine whether we have jurisdiction under the new Code of a direct appeal of an interlocutory order of a bankruptcy court where the parties agree to the appeal.

Section 405 of Title IV of the Code sets forth the jurisdiction and procedure for appeals during the transition period from October 1, 1979, to April 1, 1984. *See In Re Andrews v. South Dakota Student Loan Corp.*, 636 F.2d 233 (8 Cir. 1980). Direct appeals to courts of appeals during this period are governed by Section 405(c) (2) which provides as follows:

> During the transition period, the jurisdiction of the district courts, the courts of appeals, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by sections 236, 237, 238, and 241 of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under section 201 of this Act.

Section 236 referred to in the above quoted section provides in pertinent part as follows:

Sec. 236. (a) Chapter 83 of title 28 of the United States Code is amended by inserting immediately after section 1292 the following:

§ 1293. Bankruptcy appeals

(a) The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.

(b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States of from a *final judgment, order or decree of a bankruptcy court* of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

(Emphasis supplied).

By reading Section 405(c)(2) and Section 236 together it appears that new Title 28 U.S.C., Section 1293(b), which is a part of Section 236 of the new Code, has been in effect since the enactment of the Code and governs the jurisdiction of a court of appeals of an appeal from a judgment, order or decree of a bankruptcy court during the transition period. However, some confusion may exist as to jurisdiction and procedure during this period. This is due to seeming conflicts or inconsistencies in various sections of the new Code relating to their effective dates. For instance, Section 402(a) and (b) provide:

EFFECTIVE DATES

Sec. 402(a) Except as otherwise provided in this title, this Act shall take effect on October 1, 1979.

(b) Except as provided in subsections (c) and (d) of this section, the amendments made by title II of this Act shall take effect on April 1, 1984.

New Title 28 U.S.C. § 1293(b) is a part of Title II of the new Code. Without reading further it would appear that Section 1293(b) aforesaid would not be effective until April 1, 1984. This is not the case, however, because there is a special part of the Code that expressly and specifically governs jurisdiction for appeals during the transition period. Section 405(c)(2) provides that Section 236 of the Code governs appeals from orders, etc., of bankruptcy courts to courts of appeals during this period. As stated above, new Section 1293(b) is contained in Section 236 of the Code and it is, therefore, in force and controls the jurisdiction of courts of appeals during the transition period. See the following statements in 1 *Collier on Bankruptcy, supra,* ¶ 3.03:

> [iv] — Transition: * * *
>
> * * * sections 405(c)(1)(B) and 405(c)(2) of the 1978 legislation, respectively, provide for direct appeal to the court of appeals if the parties agree, and for jurisdiction of the court of appeals to hear such appeals, * * *
>
> Id. at 3-272
>
> * * * During the transition period, the jurisdiction of the various courts in an appellate process — appellate panels, district courts, and courts of appeals — is to be the same as it will be following April 1, 1984.
>
> Id. at 3-231
>
> [iii]—Appeals to Court of Appeals. 28 U.S.C. § 1293(b).
>
> Section 236(a) of the 1978 statute provides a third possible avenue of appeal by adding section 1293(b) to 28 U.S.C., which provides, in part, that the courts of appeals shall have jurisdiction "of an appeal from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals."
>
> Although section 236(a) of the 1978 statute does not become effective until April 1, 1984, sections 405(c)(1) and (2), dealing with appellate jurisdiction and procedure

during transition, make section 236 applicable during that period.

Id. at 3-231-232

[vi]—Transition.

During transition, the following jurisdictional grants will be in effect:

(1) The jurisdiction of the court of appeals is that conferred by new 28 U.S.C. § 1392, added by section 236 of the 1978 legislation (sections 405(c)(1)(B) and 405(c)(2) of the 1978 legislation);

Id. at 3-311

We conclude that new Title 28 U.S.C. § 1293(b) governs and determines whether we have jurisdiction of the present appeal. The plain meaning of the provisions of that section is that the order, judgment or decree of the bankruptcy court must be a *final* one before a court of appeals has jurisdiction to consider it on a direct appeal. This being true, it follows that a court of appeals does not have jurisdiction of a direct appeal of an *interlocutory* order, judgment or decree of a bankruptcy court.

See the following statement in 1 *Collier on Bankruptcy*, *supra*, ¶ 303:

* * * no direct appeal of an interlocutory order of a bankruptcy court lies to the court of appeals.

Id. at 3-308

Applying the above sections of the Code to the case before us, we conclude that the order appealed from is interlocutory in character and is not a final judgment, order or decree, and, therefore, we do not have jurisdiction of the appeal.

Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

FORMER FIFTH

In the Matter of
JONATHAN KUTNER, ET AL., DEBTORS.
DANIEL C. STEWART,

Appellant,

v.

JONATHAN KUTNER, ET AL.,

Appellees.

No. 80-1416.

United States Court of Appeals,
Fifth Circuit.*
Unit A

Nov. 6, 1981.

Appeal from the United States Bankruptcy Court for the Northern District of Texas; John C. Ford, Bankruptcy Judge.

ON PETITION FOR REHEARING

(Opinion September 21, 1981, 5 Cir., 1981, 656 F.2d 1107)

Before SKELTON**, Senior Judge, and RUBIN and REAVLEY, Circuit Judges.

SKELTON, Senior Judge.

Upon consideration of the Petition for Rehearing, we delete the following sentence from the opinion:

> The order in the instant appeal merely disposes of an incidental procedural matter during the proceedings in the bankruptcy court, but it is not an order or judgment that ends the bankruptcy proceeding.

and substitute therefor the following paragraph:

> The order in the instant appeal merely disposes of an incidental procedural matter during the proceedings in the bankruptcy court, but it is not final. Compare 28 U.S.C. § 1291 and the cases interpreting that statute.

In all other respects the Petition for Rehearing is DENIED.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 — October 14, 1980.

**The Honorable Byron G. Skelton, Senior Judge of the United States Court of Claims, sitting by designation.

In re JONATHAN KUTNER

SAMUEL M. ROSENTHAL

CHARLES S. CHRISTOPHER.

Bankruptcy Nos. 379-00579-F, 379-00591-F and 379-00593-F.

United States Bankruptcy Court,

N. D. Texas,

Dallas Division.

March 3, 1980.

OPINION

JOHN C. FORD, Bankruptcy Judge.

These three Chapter 13 cases[1] are all filed under the new Code. Since all present the common issue, does the Trustee have standing under Section 1307(c)[2] to file an application for conversion, they have been heard and considered jointly.

The schedules in each case reflect total debts in excess of the maximum limits set for a Chapter 13 Debtor by Section 109(e)[3]. Inasmuch as the Northern District of Texas is designated as a pilot district under Section 1501, it fell to the United States Trustee to provide a Trustee in each case. Section 151302(a). He elected to appoint a standing trustee under that option provided in 28 U.S.C. § 586(b). After a preview of each, the Trustee understandably concluded that Chapter 13 relief was not appropriate, and filed a motion to convert each case to a Chapter 7 proceeding. The Debtors, each of whom are represented by common counsel, filed

[1]Case No. 379-00593, Charles S. Christopher, Debtor, was dismissed on November 1, 1979. Case No. 379-00579, Jonathan Kutner, Debtor, was converted to a Chapter 11 on December 13, 1979.

[2]All statutory references are to Title 11, United States Code, unless otherwise indicated.

[3]To illustrate, the Kutner proceeding listed unsecured claims totalling $3,724,624.98.

virtually identical motions to strike the applications to convert upon the grounds that the Trustee was not such a party in interest as could file a motion under Section 1307(c).

Subject to the motion to strike, each Debtor further contended that the great bulk of his scheduled debts were contingent in nature, and thus not to be counted in calculating the debt limits. It is true that Section 109(e) in setting the maximum debt limits does refer to "non-contingent liquidated" debts. The Debtors concede that it is also true that each has judgments against him in excess of the $100,000 unsecured limit. They seek to avoid the impact of this concession by asserting that the debts must be classified as contingent or not at the time of their inception. If contingent when first made, the argument runs, then they will always continue to be so classified regardless of subsequent events.

I do not find that argument persuasive. Section 109(e) reads "only an individual with regular income that owes, *on the date of the filing of the petition,* noncontingent, liquidated . . ." (emph. added). The clear language of the statute, then, would seem to mandate that the classification be made as conditions exist on the date of the filing. While the Debtors bring forth many points of policy and considerations of judicial economy, matters of that type simply cannot be allowed to prevail over clear and unambiguous statutory langauge.

As a result, then, it becomes of critical importance to determine if the Trustee does have the standing to raise the issue in the first place. Clearly any creditor would be a party in interest, but as of the date of the hearing none have done so. If conversion is to be here accomplished, it must be done on the Trustee's petition alone.

There are three conversion sections in the Code, Sections 706(b), 1112(b) and 1307(c). Each uses the identical phrase . . . "on request of a party in interest . . ." The same words are used frequently throughout the Code, but are

nowhere defined. When the amendments to H.R. 8200 were offered to the House of Representatives and the Senate, identical statements were made by the Hon. Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights and by the Hon. Dennis De Concini, Chairman of the Subcommittee on Improvements in Judicial Machinery as follows:

> "Section 102 specifies various rules of construction but is not exclusive. Other rules of construction that are not set out in Title 11 are nevertheless intended to be followed in construing the Bankruptcy Code. For example, the phase 'on request of a party in interest' or a similar phase, is used in connection with an action that the Court may take in various sections of the Code. The phrase is intended to restrict the court from acting sua sponte. Rules of Bankruptcy Procedure or Court Decisions will determine who is a party in interest for the particular purposes of the provision in question, but the Court will not be permitted to act on its own." Sept. 28, 1978, 124 Cong. Rec.H. 11089, 11102; Oct. 6, 1978, 124 Cong.Rec.S. 17406, 17419.

From these remarks alone it might be assumed that Congress' only intent was to prevent unilateral action by a Court, but otherwise had no intent one way or the other as to who would be included.

Another meaning, and the one which I believe actually applies, is that the phrase does not have a single meaning which can be equally applied throughout the Code. There is no reason why a party in interest under a Chapter 7 liquidation could not include, or exclude, some different entities from a party in interest in Chapter 9, 11 or 13. Indeed, as this opinion will demonstrate, it is my conclusion that a Trustee is a party in interest under Section 706 but not under 1302.

As a point of beginning, it should be recalled that the words "party in interest" were extensively used in the old Bankruptcy Act of 1898. See, e. g. Sections 14, 32 and 57.

Consequently, it has long since been judicially determined just what those words meant under the Bankruptcy Act. Under familiar rules of statutory construction, and in the absence of some clear indication to the contrary, Congress will be deemed to have been aware of the meaning supplied by the Courts and to have intended the same words to have the same meaning. It might not be amiss to note that this presumption here is not an artificial one. The new Bankruptcy Code was eight years in its preparation, as a joint effort from bankruptcy scholars, practitioners and the judiciary.

The primary meaning ascribed is "one whose pecuniary interest is directly affected by the bankruptcy proceeding". *In Re Woodmar Realty Co.*, 241 F.2d 768 (7th Cir. 1957); *In Re Transatlantic and Pacific Corp.*, 216 F.Supp. 546 (S.D.N.Y. 1963); *In Re Statewide Theatres Corp.*, 4 F.Supp. 86 (D.Del.1933); *In Re Devonian Mineral Spring Co.*, 272 F. 527 (N.D.Ohio 1920). This same common sense concept is sometimes expressed as "those who have an interest in the res to be administered and distributed". *Rosenbaum v. Dutton*, 203 F. 838 (8th Cir. 1913); *In Re Sully*, 152 F. 619 (2d Cir. 1907).

The Trustee in Bankruptcy was also classed as a party in interest, but upon the basis of powers he derived from those creditors whose rights he represented.

As originally conceived under the old Bankruptcy Act, the creditors were to elect one of their own number to serve as the Trustee in Bankruptcy. He, in turn, served as the representative of all of the creditors, in his statutory duties of the liquidation and distribution of the state, the investigation of the debtor's affairs and the prosecution of such causes of action as might exist. Since creditors are the main parties in interest, it would reasonably follow that their representative should also be a party in interest.

That brings us, then, to the question of whether a Trustee under Chapter 13 is also the representative of creditors so

these cases would still have some precedent value. The Trustee here argues that his function is essentially the same as it would have been in a pre-Code bankruptcy liquidation, but this does not appear to be an accurate characterization. Rather, Congress seems to have intended the Chapter 13 Trustee to be more of a hybrid ombudsman. His duties are expressly set out in Section 1302(b)[4].

Subsection (2) expressly gives the Chapter 13 Trustee the right to "appear and be heard" at any hearing concerning either property values subject to a lien, confirmation or modification of a Plan after confirmation.[5]

Two items of significance can be noted from this subsection. First, and obviously, the right to appear and be heard at a conversion hearing is omitted. If we take the omission as being of significance, under the doctrine of *expressio unius est exclusio alterius*, then that omission is determinative of the issue. While this particular canon of construction is sometimes said to be among the weaker canons, it is of more import here where the Congressional listing purports to be both inclusive and exhaustive. 2A *Sutherland, Statutory Construction* § 47.23.

Second, and perhaps even more telling, is the right bestowed upon the Chapter 13 Trustee to appear and be heard at the confirmation hearing. Section 1302(b)(2)(B). The significance is that this right has already been bestowed by Congress upon "a party in interest" in Section 1324. If, therefore, Congress regarded a Chapter 13 Trustee already to be a party in interest, then he already had that right and the duplicate grant in Section 1302(b)(2)(B) is only a pointless redundancy.

Finally, under Section 1302(b)(3) the Trustee is given the affirmative duty to advise and counsel with the Debtor

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[4]Section 15302(b) in a pilot district, but identical in wording to Section 1302(b).

[5]Language authorizing the Trustee to "raise or initiate" such issues are not found in Chapter 13.

on nonlegal matters. This concept is completely new,[6] and would certainly be inconsistent with an idea that the Trustee is to play the same role as the creditor-oriented, pre-Code Trustee in Bankruptcy, as the Trustee here urges. We can assume Congress realized helpful advice and counsel should at least be objective. If the Chapter 13 Trustee is only to carry on as the creditors' representative, then the net effect of 1302(c) is to have the Debtor seek advice from his creditors, which could lead to some uneven consequences.

As further support for that position, he also contends that he is the creditors' representative; particularly in the pursuit of litigation. This statement would seem to be inaccurate, and thus not supporting the Trustee's position. The Congressional expression of intent is to the effect that the Debtor also has the power to sue and be sued:

> "Section 1303 of the House Amendment specifies rights and powers that the debtor has exclusive of the Trustee's. The Section does not imply that the Debtor does not also possess other powers concurrently with the Trustee. For example, although Section 1323 is not specified in Section 1303, certainly it is intended that the Debtor has the power to sue and be sued." Sept. 28, 1978, 124 *Cong.Rec.* 11089, 11103.

On the other hand, the position that the Chapter 13 Trustee does have standing to seek conversion is supported by a statement in the text in 5 *Collier, Bankruptcy*, § 1307.-01[4] (15th Ed.).

> "On the request of the Debtor, a creditor, or the Chapter 13 Trustee, the Court may. . . ."

I do not find that statement persuasive since there is no discussion whatever to indicate how the conclusion was reached, and the sole authority cited in support is Section 1307(c) itself. It appears likely that the author of this

[6]Under the former Chapter 13 wage earner's arrangement, the Trustee was not appointed until after the Plan had been confirmed. Section 633(4), Bankruptcy Act.

usually reliable text was thinking only in terms of the construction given to that phrase under the old Act, but without any consideration as to the applicability of those decisions to the new Chapter 13. The other major bankruptcy work takes a neutral position, without attempting to enumerate just who is or is not to be included, ". . . on request of a party in interest . . ." 5 *Bkr.L.Ed.* § 45.51.

The Trustee finally argues that since the United States Trustee would be a party in interest, and since he is the appointee of the United States Trustee, then he must have some species of derivative standing. I do not find that position persuasive for, if sound, it would result in Chapter 13 Trustees being parties in interest in pilot districts but not in non-pilot districts.

It is by no means clear that the United States Trustee is a party in interest.

> "It should be noted that a United States Trustee is apparently not a 'party in interest' ". 5 *Collier, Bankruptcy* § 1109.-02[3] (15th Ed.).

This conclusion stems from the use elsewhere in the Code of the phrase "on request of a party in interest or the United States Trustee." See Sections 151104, 151105.

Two other major considerations support the conclusion that the Chapter 13 Trustee is not a party in interest. These are found in Section 1109(b). This section, which is applicable only to Chapter 11 Reorganization proceedings, provides that the Trustee and others named ". . . . may raise and may appear and be heard on any issue in a case under this Chapter."

It seems to be of considerable significance that Section 1109(b) is found only in Chapter 11 with no equivalent section in Chapter 13. If we accept the Trustee's contention that he is already a party in interest, then we must also explain away the express inclusion of "Trustee" in Section 1109b as another pointless redundancy by Congress. Bearing in mind the lengthy and careful consideration

which went into the new Bankruptcy Code, we are compelled to the conclusion that these are not pointless redundancies but deliberate exclusions expressing Congressional intent.

Additionally, it must be noted that the power bestowed upon the Chapter 11 Trustee in Section 1109(b) differs in still another major respect from the powers granted to the Chapter 13 Trustee in Section 1302(b)(2). The Chapter 11 Trustee "may raise" any issue while the Chapter 13 Trustee may only appear and be heard on designated issues. The inescapable conclusion is that the Chapter 13 Trustee may not initiate anything. He may appear and be heard only upon selected things.

The fundamental difference between a Chapter 11 and Chapter 13 Trustee is also supported by the conceptual differences between the two chapters. The Chapter 11 Reorganization proceeding contemplates a negotiated settlement, by way of Plan approval,[7] between unsecured creditors, secured creditors, shareholders and any other competing groups. The present Chapter 11 is a merger of former Chapters 10, 11 and 12 of the Bankruptcy Act. Now, in this single chapter, there can be modification, and even elimination of both creditor claims, even secured, and ownership interests. It can be realistically anticipated that there will be extensive negotiations between the differing entities.

The Chapter 11 Trustee is appointed only as the exception, and not as the general rule. Section 1104. If appointed, then, he plays a key role from that point forward, even including the right to propose his own Plan of Reorganization. Section 1121(c).

There is need in Chapter 11 for some entity, with standing, to keep the proceeding progressing if progress is feasible, or otherwise to halt the proceedings and convert to liquidation, and to bring his weight to bear upon any obstruction from any source toward that objective. Under

[7]And there may be more than one Plan filed.

the Bankruptcy Act, that duty often fell to the Court. Now it is to be hoped the Chapter 11 Trustee will step into the gap.

Chapter 13, however, proceeds upon a completely different basis. Since it is available only to individuals, there are no shareholder interests to be considered. Unsecured creditors do not vote, and consequently no creditors' committees are contemplated. If affected, secured creditor approval is required, although it appears much more probable that Debtors will employ one of the so-called "cram down" provisions found in Section 1325(a)(5). In short, then, no need really exists in Chapter 13 for the "roving gun" idea of the Chapter 11 Trustee and nothing can be discovered to indicate a Congressional intent to import that concept from the one Chapter to the other.

Finally, as a matter of policy, conversion from Chapter 13 to either 11 or 7 is a step of considerable consequence to creditors. Each Debtor, here, as his final alternative plea, asked to be allowed to convert to Chapter 11, rather than the Chapter 7 liquidation sought by the Trustee. At least one of these cases would appear from the schedules to be a no-asset estate. The Trustee was asked why he would not favor conversion to Chapter 11 rather than liquidation so as to provide the debtors a chance to see if they could negotiate a compromise payment plan acceptable to their creditors. It was the Trustee's opinion, in response, that each case was so hopeless that there was no point in "prolonging the agony". That may well be so, but this Court would have preferred to have heard from, and frankly would be far more influenced by, those who actually have a pecuniary interest directly affected by the proceeding. Negotiation has always been the life blood of bankruptcy matters, and that doubtless will be just as true under the new Code as under the old Act. It cannot be said, therefore, that Congress erred in restricting a matter of such significance as a conversion motion to those who have some direct financial interest in the estate being administered. It is, after all, the Debtor's agony which will be prolonged and not that of the

Trustee's. Unless the real creditors have no interest in negotiations, then the Debtor's desire to negotiate a Plan for payment should be encouraged.

In sum, then, it is concluded that a Trustee in a Chapter 7 liquidation may move for conversion under Section 706(b) since he is there acting as the representative of the creditors and the old authorities still apply. A Chapter 11 Trustee may move for conversion under Section 1112(b) but only because of the express grant of authority so to do found in Section 1109b. A Chapter 13 Trustee, however, is without standing to file a motion under Section 1307(c). The Debtor's Motions to Strike, accordingly, are sustained.

Public Law 95-598 § 405(c)(1) During the transition period, an appeal from a judgment, order, or decree of a United States bankruptcy judge shall be —

(A) if the circuit council of the circuit in which the bankruptcy judge sits so orders for the district in which the bankruptcy judge sits, then to a panel of three bankruptcy judges appointed in the manner prescribed by section 160 of title 28 of the United States Code, as added by section 201 of this Act;

(B) if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals; or

(C) to the district court for the district in which the bankruptcy judge sits.

(2) During the transition period, the jurisdiction of the district courts, the courts of appeals, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by sections 236, 237, 238, and 241 of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under section 201 of this Act.

11 U.S.C.A. § 109(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and non-contingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title.

11 U.S.C.A. §1307(c) Except as provided in subsection (e) of this section, on request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including —

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1321 of this title;

(4) denial of confirmation of a plan under section 1325 of this title and denial of additional time for filing another plan or a modification of a plan;

(5) material default by the debtor with respect to a term of a confirmed plan;

(6) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title; and

(7) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1151

In the Supreme Court of the United States

October Term, 1981

DANIEL C. STEWART,
PETITIONER

VS.

JONATHAN KUTNER, et al
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DANIEL C. STEWART, Trustee
PETITIONER

VS.

JONATHAN KUTNER, et al
RESPONDENT

STATEMENT OF THE CASE

All parties to this proceeding are shown by the caption.

The following additional facts are helpful in presenting the issue:

a. Petitioner errs when he states that the other two cases, Kutner and Christopher were subsequently converted to Chapter 7, or ordinary

bankruptcy. In fact, they were both converted to Chapter 11, the reorganization chapter. Moreover, the Plan of Reorganization proposed by each were thereafter approved by the creditors and confirmed by the Bankruptcy Court.

b. Despite the style, the only debtor whose case is presented to this court is that of Samuel M. Rosenthal a 68 year old employee of a butcher shop.

c. The schedule of assets filed by him reflect total non-exempt assets of $25.00.

d. His exempt assets, home, furnishings and vehicle, are subject to a tax lien in the amount of $68,000.00.

e. The Debtor, by prior agreement with the Internal Revenue Service, is paying $500.00 each month on that tax lien.

f. Other than those monthly payments to

the Internal Revenue Service, no other creditor of Sam Rosenthal's will ever receive one cent, regardless of whether Chapter 7 or 13 be selected.

SUMMARY OF ARGUMENT

The conflict covers only transition statutes and thus ends on April 1, 1984.

The basis of the conflict seems to be that the Second Circuit Judge overlooked code Section 405(c)(2).

The congressional intent to eliminate the interlocutory appeals allowed by the old Bankruptcy Act is wise and not in any conflict with earlier decisions of this court construing old Act sections.

Interlocutory appeals of important issues can still be made to the District Court or Bankruptcy Appellate panel although only by prior leave being obtained.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

The conflict presented by the Second and Fifth

Circuit decisions ends in any event on April 1, 1984. This results from fact that the two circuits both agree that on that date 28 U.S.C. §1293-b becomes fully effective barring future interlocutory appeals. The point of disagreement is on the applicability of that statute during the new Bankruptcy Code's transition period from October 1, 1979 to March 30, 1984. The first consideration then for this court is that any decision which it might render in resolving the conflict will shortly have only a historic interest.

Unfortunately, the conflict is not sharply presented, nor is it really apt to cause future confusion since it is too easily reconciled. Both cases did raise the finality issue *sua sponte*, and each did reach a contrary conclusion. *In Re Riddervold*, 647 F2d 342 (2d Cir 1981) was decided in April of 1981. That opinion devotes a total of eight sentences to the issue, concluding with the sentence quoted in petitioner's brief. The opinion below in the case *sub judice*, *In Re Kutner*, 656 F2d 1107 (5th Cir. 1981), deals only with the finality point. Unfortunately, it did not even notice, much less distinguish, the *Riddervold* decision.

Both decisions are in complete agreement that Congress has limited the general right of appeal under the Bankruptcy Code to final judgments. It has done so by enacting 28 U.S.C. §1293(b) which closely

follows the companion statute, 28 U.S.C. §1291, covering appeals from District Courts. This amendment adding §1293 is found in Section 236 of Title II of the Bankruptcy Code. Title II in general covers the necessary amendments to the United States Code and to the Federal Rules of Evidence so as to accomodate the new code.

Title IV of the code covers the transition period, and sets out the effective dates. Section 402(a) provides the code itself was effective on October 1, 1979, while Section (b) sets out the general rule that the Title II amendments would not become effective until April 1, 1984 "except as provided in Subsections (c) and (d)." These Subsections, in turn, enumerate the different sections but Section 236 is not among those set out.

As the Fifth Circuit points out in its decision, "without reading further it would appear that Section 1293(b) aforesaid would not be effective until April 1, 1984." Of course, that is exactly what the Second Circuit did in *Riddervold* when it concluded that "for whatever reason" Congress evidently intended to delay the finality requirement until April 1, 1984.

The Fifth Circuit, however, did read further and encountered Section 405(c)(2), which provides rather

clearly that "during the transition period, the jurisdiction of. . .the Courts of Appeals. . .shall be the same as the jurisdiction. . .under the amendments made by Section 236. . . . ." Regretably, the Second Circuit does not refer to that Section nor explain why it felt it was not controlling. Had they done so, then it could have eliminated any prospect that we have more of an oversight than a conflict. All of this legislative history and sectional interplay is discussed in considerable depth in 1 *Collier, Bankruptcy* (15th ed.) §3.03.

To be sure, the Congressional technique of making 28 U.S.C. §1293-b immediately effective in this manner is circuitious and confusing just as the *Kutner* opinion admits. If the time is spent, however, to read all the way through, the Congressional intent is unquestionably clear albeit clumsy. Still if this court is compelled to write a law review article everytime a legislative body indulges in obfuscation, then nine hundred Judges will not be enough.

Certainly no one can quarrel with the Congressional conclusion that no special reason exists to continue in Bankruptcy practice the luxury of interlocutory appeals. Indeed, the delays of continuing appeals are especially destructive in bankruptcy proceedings where you commence with a financially

distressed debtor and creditors who would at least appreciate a fairly rapid settlement of their debts. It is true, as petitioner urges, that interlocutory appeals would allow a more rapid accumulation of decisions. It is also true that this benefit would apply in every area of the law but could be obtained only at a price of increasing the judicial burden.

There is also no quarrel with the correctness of the earlier decision of this court in *Securities and Exchange Commission vs. American Trailer Rental Company,* 379 U.S. 594 (1965), confirming the right of the Securities and Exchange Commission to enter a Chapter XI case and seek conversion to a Chapter X. On the finality point, that decision was decided under a statute which granted appellate jurisdiction "in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy. . . ." 11 U.S.C. §47 (Section 24a, Bankruptcy Act of 1898).

Not only is that statute radically different from the new code, but also Section 1109 of the code was specifically intended to change the rule of the *American Trailer Rental's* decision under the code.

It also should be observed that the Second Circuit did not deal with an interlocutory procedural

order as does the Fifth Circuit, but was on a Motion for Summary Judgment in an adversary proceeding An adversary proceeding is, of course, the name given by the Bankruptcy Rules of 1973 to a separate lawsuit dealing with a specific matter but brought in a bankruptcy proceeding. A final judgment on the merits in such an adversary proceeding will satisfy the finality requirements for appellate jurisdiction.

In *Riddervold*, the Bankruptcy Judge had granted Defendant's motion to dismiss on the merits. The fly in the ointment was that the Plaintiff there had sued four separate Defendants on four separate causes of action but all in a single complaint and docket number. Perhaps this unhappy technique resulted from the new $60.00 filing fee required for adversary proceedings. Be that as it may, the Plaintiff had already won one of the "sub-cases" when it lost the second and attempted the appeal. The other two "sub-cases" were evidently still pending and thus the finality issue was raised. It could have been just as easily resolved by a severance of the four separate causes of action so that, at the worst, the Second Circuit reached a correct result even if by a questionable analysis.

Petitioner seems to be contending that because

a conversion is important, it should be deemed "final" so that it can be the subject of an appeal. Petitoner evidently overlooks the fact that interlocutory orders are still appealable, even under the new code. Such orders may be appealed to the appellate panel under 28 U.S.C. §1482(b) or to District Court under 28 U.S.C. §1334(b). The difference is that an interlocutory appeal may be heard only by leave of the panel or the District Court. 1 *Collier, Bankruptcy* (5th ed.) §3.03(d)[v].

This approach allows truly important interlocutory issues to receive immediate appellate review but without bogging down the bankruptcy process by permitting such appeals as a matter of the litigator's right. Congress devoted considerable time to the enactment of the new code, and was not unmindful of the fact that dilatory appeals were too often just a device to extract an inequitable settlement.

Certainly Petitioner here is not seeking to extract any unfair advantage. Nevertheless, the purity of his motives can not take away from the fact that it matters not a bit to anyone what chapter this particular Debtor is in. Petitioner correctly states that the creditor rights to object to discharge are curtailed in Chapter 13. Still, the fact that after two years no

creditor has yet sought either to object, to convert, or to join with the Trustee is rather persuasive evidence that discharge here is more of a red herring than burning issue.

CONCLUSION

The decision below is not only correct, but its decision alone is will dispel any confusion which might otherwise result from the ill-considered Second Circuit case. Considering the additional factors that this conflict becomes moot in April 1, 1984 and the importance of limiting interlocutory appeals in any event this case just does not raise any issues of sufficient importance to justify the time required for an opinion of this Court.

PHILIP I. PALMER, JR.

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Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, a member of the bar of the Supreme Court of the United States, certifies that counsel for Petitioner, Daniel C. Stewart, has been served with three copies of the foregoing Response to Petition for Writ of Certiorari by depositing the documents in a United States Post Office or mail box with first class postage prepaid, addressed to said counsel for Petitioner at his post office address, 1700 Mercantile Dallas Building, Dallas, Texas 75201.

All parties required to be served have been served.

DATED: January 18th, 1982.

PHILIP I. PALMER, JR.

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